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In the
Supreme Court of the United States.

OCTOBER TERM, 1978.

No. 78-131

ANTHONY C. MASCOLO AND
UNITED AMERICA THEATRE CORPORATION
D/B/A PUSSYCAT CINEMA,
PETITIONERS,

v.

COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

Petition for a Writ of Certiorari to the Appeals Court for the Commonwealth of Massachusetts.

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BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS.

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No. .

ANTHONY C. MASCOLO AND
UNITED AMERICA THEATRE CORPORATION
D/B/A PUSSYCAT CINEMA,
PETITIONERS,

v.

COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

Petition for a Writ of Certiorari to the Appeals Court for the Commonwealth of Massachusetts.

The petitioners, Anthony C. Mascolo and United America Theatre Corporation d/b/a Pussycat Cinema, pray that a writ of certiorari issue to review the judgment of the Appeals Court of the Commonwealth of Massachusetts entered April 25, 1978.

Opinion Below.

The opinion of the Appeals Court of the Commonwealth of Massachusetts is reported as *Commonwealth* v. *Mascolo*, ____ Mass. App. Ct. ____, 375 N.E. 2d 17 (1978) (Mass. App. Ct. Adv. Sh. [1978] 435), and is reprinted as Appendix A to this petition at pp. 1a-16a. Further appellate review was denied by the Supreme Judicial Court of the Commonwealth of Massachusetts on May 31, 1978.[1] ____ Mass. ____ (1978) (Mass. Adv. Sh. [1978] 1482).

Jurisdiction.

The judgment of the Appeals Court of the Commonwealth of Massachusetts was entered on April 25, 1978, and is reprinted as Appendix B to this petition at p. 17a. The Supreme Judicial Court of the Commonwealth denied further appellate review without opinion on May 31, 1978.[2] The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

Questions Presented.

1. Whether the petitioners' First and Fourteenth Amendment rights were infringed because the jury was permitted to

[1] Further appellate review by the Supreme Judicial Court of a decision of the Appeals Court is discretionary. Denial of further appellate review is not an affirmation of the decision or reasoning of the Appeals Court. *Ford* v. *Flaherty*, 364 Mass. 382, 387 (1973).

[2] See footnote 1, *supra*.

find them guilty without finding that they had knowledge of the contents of the film?

2. Whether petitioner Mascolo's First and Fourteenth Amendment rights were infringed by the imposition of a jail sentence upon appeal after trial *de novo* where only a fine had been imposed in the Municipal Court and where the increase in sentence was not based upon a change in circumstances?

3. Whether petitioners were deprived of their First and Fourteenth Amendment rights by the use of a jury drawn from one county to determine state-wide standards?

4. Whether the trial justice's instructions to the jury on how to determine community standards of the Commonwealth violated petitioners' First and Fourteenth Amendment rights?

Constitutional Provisions Involved.

Constitution of the United States, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Constitution of the United States, Amendment XIV:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . ..

Statutes Involved.

Massachusetts General Laws c. 272, § 29 (in part):

> § 29. [**Dissemination or possession of obscene matter; punishment; defense.**]
>
> Whoever disseminates any matter which is obscene, knowing it to be obscene, or whoever has in his possession any matter which is obscene, knowing it to be obscene, with the intent to disseminate the same, shall be punished by imprisonment in the state prison for not more than five years or in a jail or house of correction for not more than two and one half years, or by a fine of not less than one hundred dollars nor more than five thousand dollars, or by both such fine and imprisonment in a jail or house of correction. . . .

Massachusetts General Laws c. 272, § 31 (in part):

. . . . . .

> "Obscene", matter is obscene if taken as a whole it
>
> (1) appeals to prurient interest of the average person, applying the contemporary standards of the commonwealth;
>
> (2) depicts or describes sexual conduct in a patently offensive way; and
>
> (3) lacks serious literary, artistic, political or scientific value.

. . . . . .

Statement of the Case.

On March 30, 1976, a criminal complaint issued against each of the petitioners from the Municipal Court for the City of Boston alleging possession on March 29, 1976, of an obscene motion picture film, knowing it to be obscene, with intent to disseminate it in violation of Massachusetts General Laws c. 272, § 29. After trial by a judge in the Municipal Court, no jury trial being available in that court, each of the petitioners was found guilty and fined $2,500. Neither of the petitioners had a prior criminal record. The petitioners each appealed for a trial *de novo* by a jury in the Superior Court.

After the trial *de novo*, the jury found each of the petitioners guilty. Petitioner Mascolo was sentenced to serve a term of one year in the house of correction and the corporate petitioner was fined $5,000. The trial justice refused to grant a stay of execution of sentence pending appeal and petitioner Mascolo commenced service of his sentence. A single justice of the Appeals Court of the Commonwealth of Massachusetts subsequently admitted the individual petitioner to bail pending expeditious prosecution of his appeal.

On April 25, 1978, the Appeals Court affirmed the convictions of the petitioners and, upon motion of the district attorney's office, vacated the stay of execution of sentence and revoked the bail of the individual petitioner. Petitioner Mascolo commenced service of his sentence on May 24, 1978, in the Plymouth County House of Correction.[3]

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[3] Upon his incarceration, Mascolo filed a petition for a writ of habeas corpus in the United States District Court for the District of Massachusetts and filed a motion for admission to bail pending a determination on his petition for a writ of habeas corpus. After a hearing on his motion, Mascolo was admitted to bail on June 30, 1978, pending a determination on his petition for a writ of habeas corpus. The report and recommendation by the federal magistrate to the district court judge that petitioner be admitted to bail found that petitioner had "made out a clear case on the law and a clear, and readily evident, case on the facts . . . [that] the trial court effectively removed from the jury's consideration one constitutionally required element of *scienter* — *i.e.*, that petitioner was aware of the contents of the film."

The Supreme Judicial Court refused to grant further appellate review of the Appeals Court's affirmance of the convictions.[4]

In the Superior Court, the petitioners challenged the proceedings against them by filing motions to dismiss the complaints, assigning as reasons therefor, *inter alia*, that the statute under which the complaint was brought could not constitutionally be applied by a jury drawn from a local venire because the statute required that the determination of obscenity be made by applying the contemporary standards of the Commonwealth of Massachusetts (R. 9).[5] Prior to empaneling of the jury, petitioners filed a motion for state-wide venire, asserting that the discernment and application of the contemporary standards of the Commonwealth required a jury drawn from a venire broader than that of Suffolk County (R. 11-12). Petitioners also filed a motion challenging the venire, once it had been constituted, and requesting its discharge (R. 13-14), which asserted the same constitutional deficiency in the constitution of the venire. Each of these motions was denied and exceptions taken.

At the time of sentencing, petitioners objected to an increase in the sentence imposed by the Municipal Court for the City of Boston and asserted that such an increase in sentence, without a change in the circumstances, and in the context of the trial *de novo* system, impermissibly penalized them for exercising their right to trial by jury and chilled the exercise of First Amendment rights. Petitioner Mascolo also filed a motion to revise or revoke sentence on the same grounds. This motion was denied and an exception saved.

The facts introduced at trial would have permitted the jury to find that a Boston police officer had seen advertisements

[4] *See* footnote 1, *supra*.

[5] References to (R.) are to the printed Summary of the Record which contains the documents filed in the trial court.

for a motion picture entitled "Anybody But My Husband" in newspapers of general circulation in Boston and had viewed that motion picture at the theatre operated by the corporate petitioner. The police officer paid $4 to petitioner Mascolo, who was sitting in the box office, entered the theatre and observed the film. During the viewing of the film, the police officer observed petitioner Mascolo walk to the front of the theatre, adjust the thermostat and leave, all of which took two to three minutes. It was the only time that petitioner Mascolo was seen in the theatre on that day. After obtaining a search warrant, the film was seized and complaints brought against the petitioners. Petitioner Mascolo admitted that he is the manager and owner of the theatre and he is identified on the corporate papers as the president and sole director of the corporation.

Reasons for Granting the Writ.

I. THE PETITIONERS' FIRST AND FOURTEENTH AMENDMENT RIGHTS WERE INFRINGED BECAUSE THE JURY WAS PERMITTED TO FIND THEM GUILTY WITHOUT FINDING THAT THEY HAD KNOWLEDGE OF THE CONTENTS OF THE FILM.

The petitioners were charged with possession of obscene matter, knowing it to be obscene, with the intent to disseminate it.

This Court has consistently held that, to satisfy the requirements of the First Amendment and to avoid the hazards of self-censorship, an individual may not be convicted on a criminal obscenity charge without proof that he had knowledge of the contents of the matter as well as a general awareness of the character of the matter. *See, e.g., Hamling* v. *United States*,

418 U.S. 87, 123 (1974); *Mishkin* v. *New York*, 383 U.S. 502, 511 (1966); *Smith* v. *California*, 361 U.S. 147, 153 (1959). At least two federal courts of appeals have followed that requirement, *see, e.g, United States* v. *Linetsky*, 533 F. 2d 192, 204 (5th Cir. 1976); *United States* v. *Thevis*, 526 F. 2d 989, 991-992 (5th Cir. 1976); *United States* v. *American Theatre Corp.*, 526 F. 2d 48, 50 (8th Cir. 1975); *United States* v. *Friedman*, 506 F. 2d 511, 516-517 (8th Cir. 1974), as has the Supreme Judicial Court of the Commonwealth of Massachusetts. *See Commonwealth* v. *Trainor*, ____ Mass. ____ (1978) (Mass. Adv. Sh [1978] 899, 904-905); *Commonwealth* v. *707 Main Corp.*, ____ Mass. ____ (1976) (Mass. Adv. Sh. [1976] 2643, 2652). Counsel for petitioners requested that the justice so instruct the jury (R. 32).

The trial justice refused the requested instruction and charged in the disjunctive — that is, that the jury could find petitioners guilty if they found that petitioners knew the contents of the material *or* were aware of the nature and character of the material. After the instructions were concluded, counsel reqested the trial justice to amend the charge so that it would reflect that both of the *Hamling* elements must be found. The trial justice denied the request and allowed an exception.

Petitioners contend that the trial justice's instruction failed to satisfy constitutional requirements of knowledge in an obscenity case and that the affirmance of those instructions by the Appeals Court of Massachusetts is in conflict with decisions of this Court.

II. Petitioner Mascolo's First and Fourteenth Amendment Rights were Infringed by the Imposition of a Jail Sentence Upon Appeal After Trial De Novo Where Only a Fine had been Imposed in the Municipal Court and Where the Increase in Sentence was Not Based Upon a Change in Circumstances.

Petitioner Mascolo, upon conviction in the Boston Municipal Court, was sentenced to pay a fine of $2,500. Upon conviction in the Superior Court after a trial *de novo* by a jury, he was sentenced to serve one year in the house of correction. He contends that the imposition of a higher sentence upon him in this obscenity case upon his appeal to the Superior Court for a jury trial, where there was no change in the circumstances upon which the sentence was to be determined and where no jury trial is available in the Municipal Court, has the effect not only of frustrating his exercise of his right of appeal to a jury trial but also of burdening the exercise of First Amendment rights by him and by other defendants in obscenity cases.

This Court upheld the Massachusetts two-tier trial *de novo* system in *Ludwig* v. *Massachusetts*, 427 U.S. 618 (1976), in the context of a criminal charge for a motor vehicle violation. While acknowledging that the two-tier system permitted a higher sentence to be imposed upon an appeal to a jury trial, the court did not address the question of the permissibility of increasing the sentence where there was no attendant change in the defendant's circumstances. Indeed, the court noted, in support of the two-tier system, that the practice in Massachusetts appeared to be that the Superior Court justice would impose the same sentence imposed by the lower court and that that fact created little reason not to appeal and take the risk of an acquittal. *Id.* at 627 n. 4.

While any criminal defendant might forgo his constitutional right to a trial by jury where the risk is of a greater sentence than he received in the Municipal Court, a defendant in an

obscenity case loses something more than a defendant in a non-obscenity case. This Court has recognized that a trial by jury in an obscenity case not only is a constitutional right but is the recognized and accepted method of determining what constitutes community standards — a determination which a jury is better suited to making than a judge, if only because the increase in numbers will bring a greater cross-section of community views to bear on the issue. *See Smith* v. *United States*, 431 U.S. 291, 316 n. 14 (1977); *Miller* v. *California*, 413 U.S. 15 (1973). *Cf. Ballew* v. *Georgia*, ____ U.S. ____, 98 S. Ct. 1029, 1034-1037 (1978). Community views, of course, provide the standard by which the question of obscenity is to be resolved.

If a higher sentence may be imposed on a defendant in an obscenity case upon his appeal for a jury trial without a change in circumstances, a clear impact will be had upon the exercise of First Amendment rights. In typical non-obscenity cases, a firm standard or rule of law has been established either by statute or by judicial decision which must be applied by the jury in determining the guilt or innocence of a defendant. This has two effects. First, it permits the defendant to "know" whether he is guilty or innocent because he knows with reasonable certainty whether his conduct was violative of the statute under which he is charged. Second, in the event of an improper application of the standard by a judge or jury, appellate review will be easy and effective because the same standard which was to be applied in the trial court is known as well by the appellate court. Thus, a defendant can be assured that, if error in the application of the standard infects the verdict, he can obtain effective and meaningful appellate review. In an obscenity case, however, the community standards to be applied in determining obscenity are not given to the trier of fact. Instead, the trier of fact must first determine what the

standard is and then apply it. Accordingly, the defendant does not know before trial, or even after it, the standard by which his conduct is to be measured. Thus, he has no way of "knowing" whether he is guilty or innocent. The appellate judges are equally incapable of knowing what contemporary standards were applied. They can only decide whether the material was constitutionally protected and not whether it was protected by the contemporary standards of the relevant community. The inability of a defendant to assess what a jury will decide the community standards are, as well as the inability of appellate judges effectively to review that decision, necesarily will prompt a defendant not to appeal from the lower court to a jury trial where the lower court sentence is "acceptable" in the sense that it is tolerable. Thus, the threat that a higher sentence will be imposed without a change in circumstances subtly, but effectively, prompts an obscenity defendant to forgo his right to a trial by that forum most capable of determining whether the material was protected or not protected.

This Court's decision in *Colten* v. *Kentucky*, 407 U.S. 104 (1972), is distinguishable for several reasons. In that case, a jury trial was available in the lower court, only misdemeanors were required to be tried in the lower court, and the increase in the sentence was from a $10 fine to a $50 fine. In this case, no jury trial was available in the Municipal Court, the charges against petitioners are felonies, and, without a change in circumstances, the substantial fine of $2,500 was increased to a lengthy jail term of one year in the house of correction. Moreover, this case required the application of an unknown standdard by the trier of fact best suited to deciding what the standard is — the jury. *See Kansas City* v. *Darby*, 544 S.W. 2d 529 (Mo. 1976), holding unconstitutional Missouri's two-tier trial system as applied in obscenity cases only because a jury is not available in the lower court.

Given petitioner Mascolo's lack of a prior criminal record, the increase in the sentence violated the First and Fourteenth Amendments.

III. Petitioners were Deprived of their First and Fourteenth Amendment Rights by the Use of a Jury Drawn from One County to Determine State-Wide Standards.

Massachusetts General Laws c. 272, § 31, defines matter as "obscene" by reference to the contemporary standards of the entire Commonwealth. This statutory definition was enacted subsequent to this Court's decision in *Miller* v. *California*, *supra*, which left to the states the right to decide the geographical scope of the community whose standards were to be applied in obscenity cases. *See also, Smith* v. *United States*, *supra*. Thus, in Massachusetts, the relevant community is the entire Commonwealth. Accordingly, petitioners moved for a state-wide venire[6] and, subsequent to the calling of a venire from Suffolk County only, moved to challenge the venire and request its discharge. Both motions were denied and petitioners saved their exceptions.

Petitioners contend here that to satisfy First and Fourteenth Amendment requirements, where a state has defined the geographical area whose standards are to be applied in determining the issue of obscenity, the jury must be drawn from the entirety of that area and may not systematically be limited to one small portion of it. This argument is founded upon the requirement that a cross-section of the community as a whole must be the judge of obscenity and that a small, atypical subset of the community is impermissible. *See Smith* v. *United States*, *supra*, at 300 n. 6. This First Amendment requirement augments the Sixth Amendment requirement that a jury be of sufficient size to constitute a cross-section of the

[6] Such a venire may be convened pursuant to M.G.L. c. 234, § 10.

community in order to bring community views to bear on the issue to be determined. *See Ballew* v. *Georgia*, *supra*. It is akin to the principle that the systematic exclusion of minorities or other classes of persons from a jury deprives a defendant of the necessary cross-section of the community. *See id.* The denial of the petitioners' motions in this case mandated the exclusion from the venire of all persons in Massachusetts other than those who reside in the county where the trial was held.

The Supreme Judicial Court of Massachusetts has judicially noticed the fact that the citizens of the Commonwealth differ from each other in numerous ways, including upbringing, place of residence, age, education, religion and sex. *See Commonwealth* v. *Trainor*, *supra*, at 904. That communities tend to be homogeneous and that characteristics of a population vary from urban to rural settings and between and among communities emphasizes the fact that a jury drawn from a venire limited to Suffolk County, the only major urban population center in the Commonwealth of Massachusetts, is not drawn from a typical community in Massachusetts and, therefore, is not representative of and cannot bring to bear the constitutionally required cross-section of community views to resolve the issue of obscenity.

IV. The Trial Justice's Instructions to the Jury on How to Determine Community Standards of the Commonwealth Violated Petitioners' First and Fourteenth Amendment Rights.

Petitioners contend that the trial justice erred in instructing the jury on how to determine what the contemporary community standards of Massachusetts were. In the context of instructing the jury on the first prong of the three-pronged test of obscenity, which requires the application of the contemporary

standards of the Commonwealth, the justice gave instructions concerning what he asserted was an analogous situation. His analogy was to an instance where an individual might drive an automobile while being in a condition where other persons might say that he should not be driving. He instructed that, in doing that, the person would be violating not only a statute of the Commonwealth but also standards that would appeal to the jurors or to other persons if they were decent people. From that, he suggested, the jury could find that the driver fell below the standards of the community and that, even if they were to find 40 people just like that driver who did the same thing, they would have to agree that all 40 fell below the contemporary standards of the community. His stated conclusion was that while in some areas there are community standards, the fact that numbers of people from time to time in various locales fall below them does not alter the standards (Tr. 359-361).[7]

The judge's analogy was a blatantly incorrect statement of the law of obscenity and contradicts the whole notion of community standards as delineated in *Miller* v. *California*, *supra*. The judge charged the jury, in essence, that if a substantial number of people drive while under the influence of alcohol, that fact does not alter the standards set out in the statute governing driving while under the influence of alcohol. While that may be a correct statement of the law with respect to a charge of driving under the influence, it is totally incorrect with respect to a determination of the contemporary standards of a community in an obscenity case. In the latter case, if a substantial population holds a certain view as to whether matter appeals to a prurient interest of an average person or depicts or describes sexual conduct in a patently offensive way and that group is so perceived as holding that view by the jury,

[7] References to (Tr.) are to the transcript of the testimony and other proceedings at trial.

then their view must necessarily be considered in determining the applicable contemporary standards. Unlike the law of driving under the influence of alcohol, in obscenity cases there is no particular enunciated rule of behavior or standards which remains unchanged over time. The justice's instructions permitted the jury to disregard the views of substantial portions of the community whom the jury did not perceive to be "decent" persons. Accordingly, it permitted the jury to disregard the views of substantial segments of the community and to base its determinations on some unknown, potentially atypical subset of the community. This violated the petitioners' First and Fourteenth Amendment rights. Cf. *Pinkus* v. *United States*, ____ U.S. ____, 98 S. Ct. 1808 (1978).

Conclusion.

For the reasons stated, petitioners assert that the affirmance of their conviction by the Appeals Court of Massachusetts was not in accord with applicable decisions of this Court and that this Court should grant the petition for a writ of certiorari to the Appeals Court of the Commonwealth of Massachusetts.

Respectfully submitted,

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Appendix A.

APPEALS COURT.

No. 77-924.

COMMONWEALTH *vs.* ANTHONY C. MASCOLO
(and a companion case[1]).

Suffolk. January 9, 1978. — April 25, 1978.

Present: HALE, C.J., KEVILLE, & BROWN, JJ.

Search and Seizure. Obscenity, Community standard. *Constitutional Law*, Obscenity. *Practice, Criminal*, Examination of jurors, Instructions to jury, View, New trial, Appeal to Superior Court. *Evidence*, Relevancy and materiality.

COMPLAINTS received and sworn to in the Municipal Court of the City of Boston on April 1, 1976.

Upon appeal to the Superior Court the cases were tried before *Bennett*, J.

Morris M. Goldings (*Kenneth H. Tatarian* with him) for the defendants.

Timothy P. O'Neill, Assistant District Attorney, for the Commonwealth.

KEVILLE, J. This is an appeal by Anthony C. Mascolo (Mascolo) and the United American Theatre Corporation (corporation), from convictions under G. L. c. 272, § 29, for possession of an obscene motion picture film with intent to disseminate. The defendants were found guilty in the Municipal Court of the City of Boston. Mascolo was fined $2,500 and the corporation $2,500. The defendants appealed to the Superior Court for a trial de novo where they were

[1] Commonwealth *vs.* United American Theatre Corporation (d.b.a., Pussycat Cinema).

found guilty by a jury. Mascolo was sentenced to one year in a house of correction and the corporation was fined $5,000. The defendants have appealed under G. L. c. 278, §§ 33A-33G. The jury could have found the following:

On March 29, 1976, two police detectives viewed the allegedly obscene film at the Pussycat Cinema. They paid the required admission fee at the box office to the defendant Mascolo. One of the detectives took notes throughout the movie. During the movie one of the detectives noticed Mascolo walk down an aisle to the front of the theatre to adjust a thermostat. Following their viewing of the entire film, which lasted for approximately eighty minutes, they prepared an affidavit in support of a request for a warrant. The affidavit included a statement which depicted each scene of the film in detail.

The warrant was issued; and on March 30 the detectives returned to the theatre where the same film was being exhibited. While in the presence of his attorney, Mascolo stated, "I am the entire business. I am the sole corporater [*sic*]. It is a one man business." The detectives seized the film and certain business records. Mascolo signed a receipt for the items seized as "manager and owner." The detectives obtained additional business records from public files and through a subpoena duces tecum. The sole witness at trial was the detective who had taken notes during the movie and had executed the affidavit in support of the warrant. The film was exhibited to the jurors. Further facts will be stated as necessary in the discussion of the issues.

Contrary to the defendants' assertion, there was no error in the denial of motions to suppress certain evidence seized pursuant to the warrant which issued without the issuing magistrate's having viewed the film. In support of their contention the defendants assert that the warrant issued without an independent determination by the issuing official, without

probable cause, and that the scope of the warrant was so sweeping as to constitute a "general warrant." It has been concluded in several decisions that there is no requirement that a magistrate view an allegedly obscene film prior to the issuance of a warrant for its seizure. *United States* v. *Sherpix, Inc.*, 512 F. 2d 1361, 1368-1369 (D.C. Cir. 1975). *United States* v. *Marks*, 520 F. 2d 913, 917 (6th Cir. 1975), rev'd on other grounds, 430 U.S. 188 (1977). *United States* v. *Christian*, 549 F. 2d 1369, 1371 (10th Cir.), cert. denied, 432 U.S. 910 (1977).[2]

In each of the cases just cited the issuing magistrate had not viewed the film but based his decision upon affidavits which had depicted its content in detail. The descriptions in those cases and in the instant case as well were sufficiently detailed to allow the issuing official to focus searchingly on the question of obscenity. *Ibid.* Compare *Marcus* v. *Search Warrant of Property at 104 E. 10th St.*, 367 U.S. 717, 731-732 (1961). Moreover, the affidavit in the instant case established a sufficient basis for the issuing judge to make a determination of probable cause for the issuance of the warrant. *Commonwealth* v. *State Amusement Corp.*, 356 Mass. 715 (1969). *United States* v. *Christian*, 549 F. 2d at 1371. Such an affidavit is to be viewed in a "common sense and realistic fashion." *Commonwealth* v. *Cuddy*, 353 Mass. 305, 308 (1967).

Nor do we find merit in the defendants' assertion that the warrant was drawn in such vague terms that it constituted an impermissible "general warrant."[3] Contrast *Stanford* v.

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[2] The defendants rely upon *Lee Art Theatre, Inc.* v. *Virginia*, 392 U.S. 636 (1968). However, the Court in *Lee Art Theatre, Inc.*, declined to rule on the question whether a magistrate must view a film before issuing a warrant. *Id.* at 637.

[3] The exact language of the warrant was "[a] film titled 'Anybody But My Husband' and all records relating to the production, manufacture, distribu-

Texas, 379 U.S. 476, 480-485 (1965) (conviction set aside upon evidence seized under a warrant inadequately describing the things to be seized in violation of the Fourth Amendment). We think that the validity of the warrant in the instant case is supported by the holding in *Andresen* v. *Maryland*, 427 U.S. 463, 480-481 n. 10 (1976). In *Andresen*, the Court held that otherwise general language in a warrant was adequately specific where it related to evidence of a specific crime. That Court also noted, inter alia, that in search of evidence, some irrelevant documents must be examined. *Ibid.* In the instant case the warrant was limited to evidence relating to the dissemination of the specific film. Moreover, documents showing purchase, ownership or other connection with the film were probative of knowledge on the part of Mascolo and the corporation required for a conviction under § 29. *Commonwealth* v. *Thureson*, Mass. , (1976) [Mass. Adv. Sh. (1976) 2659, 2662]. We note that the defendants identified no document seized by the detectives in executing the warrant which did not relate to the crime charged. The understanding of a warrant by executing officers, as reflected in the types and numbers of items actually seized, is one indication whether the warrant adequately specified the goods to be seized. See *Standford*, 379 U.S. at 485; *Andresen*, 427 U.S. at 493 (Brennan, J., dissenting); *Commonwealth* v. *Jacobs*, 346 Mass. 300, 309 (1963). In the instant case the executing officers apparently understood the limitations imposed by the warrant.[4]

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tion or purchase of said film, including all books, records, general ledgers, cash disbursement books, cash receipt books, cancelled checks, bank statements, and deposit slips, payroll records, tax returns, correspondence files, account receivable ledgers, bills of lading and all records which would show ownership of person or persons or managerial personnel."

[4]Unlike the cases in this Commonwealth relied upon by the defendants, the warrant in the present case did more than track the broad language of the underlying statute. See *Commonwealth* v. *Jacobs*, 346 Mass. 300, 303

The defendants challenge the jury selection procedure on two grounds. They claim that there was error in the denial of their motion for a statewide venire and that the judge's examination of prospective jurors was inadequate. They argue that only a jury drawn from a statewide venire can discern and apply contemporary standards of the Commonwealth as required by G. L. c. 272, §§ 29 and 31. They assert that a jury drawn from a single county does not satisfy this requirement. However, there is no showing on the record before us that a jury drawn from a statewide venire would be more likely to perceive and to apply the contemporary standards of the Commonwealth as measured by the views of an average citizen than would a jury drawn from a single county.[5]

As to the defendants' second objection, the record shows that the judge carefully and adequately questioned prospective jurors concerning their possible bias or prejudice and that there was no abuse of discretion in denying the defendants' motion to permit defense counsel to question prospective jurors directly. *Commonwealth* v. *Walker*, 370 Mass. , (1976) [Mass. Adv. Sh. (1976) 1657, 1691] and cases cited. A judge has broad discretion in determining the extent of the inquiry to be made of prospective jurors. *Commonwealth* v. *Pinckney*, 365 Mass. 70, 73 (1974). *Commonwealth* v. *Harrison*, 368 Mass. 366, 371 (1975) [Mass. Adv. Sh. (1975) 2346, 2352]. Here the judge carefully explained the subject matter to the jurors individually and inquired of each of them whether they could arrive at a fair, impartial decision. See

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(1963); *Commonwealth* v. *Dorius*, 346 Mass. 323, 324-325 (1963); Smith, Criminal Practice and Procedure § 178, at 106 (1970).

[5]We note that the Supreme Judicial Court has upheld nonjury convictions under § 29, emphasizing that "the trier of fact may draw on his own knowledge of normative views in his own community in applying statutorily prescribed community standards." *District Attorney for the No. Dist.* v. *Three Way Theatres Corp.*, Mass. , (1976) [Mass. Adv. Sh. (1976) 2665, 2668].

Commonwealth v. *Fleurant*, Mass. App. Ct. , (1978) [Mass. App. Ct. Adv. Sh. (1978) 110, 111]. Additionally, he inquired of the jurors whether they were acquainted with the attorneys for either party. See G. L. c. 234, § 28.

The defendants challenge the validity and applicability of G. L. c. 272, § 29, claiming that § 29 does not proscribe the conduct charged against them. There is no merit in the defendants' contention that §§ 29 and 30 are unconstitutionally overbroad or vague. *Commonwealth* v. *707 Main Corp.*, Mass. , - (1976) [Mass. Adv. Sh. (1976) 2643, 2653-2654]. *Commonwealth* v. *Trainor*, Mass. , - (1978) [Mass. Adv. Sh. (1978) 899, 900-902]. Relying upon *Commonwealth* v. *Balthazar*, 366 Mass. 298 (1974), they assert that § 29 is inapplicable to private consensual conduct of adults. This argument is unpersuasive. The court in *Balthazar* held that G. L. c. 272, § 35, punishing unnatural and lascivious acts, was not applicable to private consensual conduct between adults. *Id.* at 302. That determination was based upon the emergent articulation of the constitutional right of an individual to be free from government regulation of certain sex related activities and upon the court's own awareness of changes in community values with respect to permissible sexual conduct. *Ibid.* Those considerations are inapplicable to the facts presented on this appeal. The Supreme Court has determined that commercial display of pornographic films in public theatres is not protected by a constitutional right to privacy. *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 57-58, 65-66 (1973). But see *Commonwealth* v. *Trainor*, Mass. at n. 6 [Mass. Adv. Sh. (1978) at 916 n. 6] (Abrams, J., dissenting). Moreover, a violation of § 29 does not depend upon an appellate court's awareness of changing community standards of permissible sexual conduct. The Legislature has placed the responsibility for determining and applying "contemporary standards of the Commonwealth"

(G. L. c. 272, § 31, as appearing in St. 1974, c. 430, § 12) in the hands of the jury. The court's role is limited to a determination whether, as matter of law, there was sufficient evidence upon which the jury could find a violation of § 29.

The defendants characterize the judge's instruction to the jury as a coercive, "premature and partial *Tuey-Rodriquez* charge." See *Commonwealth* v. *Tuey*, 8 Cush. 1 (1851); *Commonwealth* v. *Rodriquez*, 364 Mass. 87, 97-102 (1973). The charge approved in *Tuey* was given to a deadlocked jury to encourage further deliberation and a final verdict. Although subsequently employed in the Federal courts (*Allen* v. *United States*, 164 U.S. 492, 501 [1896];[6] *Fulwood* v. *United States*, 369 F. 2d 960, 961-962 [D.C. Cir.], cert. denied, 387 U.S. 934 [1966]), and in the courts of this Commonwealth (*Commonwealth* v. *Richardson*, 361 Mass. 661, 663-664, cert. denied, 409 U.S. 884 [1972]), the charge has been criticized for its tendency to coerce jurors into returning verdicts. See *United States* v. *Thomas*, 449 F. 2d 1177, 1182-1184 (D.C. Cir. 1971); *United States* v. *Bailey*, 468 F. 2d 652, 665-669 (5th Cir. 1972); Note, Due Process, Judicial Economy, and the Hung Jury: A Reexamination of the Allen Charge, 53 Va. L. Rev. 123, 126 (1967). These criticisms prompted the Supreme Judicial Court to reconsider and to modify the Tuey charge in *Rodriquez*, 364 Mass. at 98-100.

We perceive no indication of any such coercive potential in the judge's charge in the instant case. The several coercive elements in the Tuey charge are absent from the charge before us. An oft criticized element of the Tuey charge is an instruction that jurors in the minority should reconsider their position

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[6] In *Allen* the Court upheld the trial court which had delivered a charge "taken literally" from *Tuey*. Thus, in the Federal courts the Tuey charge is referred to as the Allen charge. *United States* v. *Bailey*, 468 F. 2d 652, 661 (5th Cir. 1972).

without an equivalent instruction to the majority. *Rodriquez*, 364 Mass. at 99. *United States* v. *Fioravanti*, 412 F. 2d 407, 416 (3d Cir.), cert. denied sub nom. *Panaccione* v. *United States*, 396 U.S. 837 (1969). *United States* v. *Flannery*, 451 F. 2d 880, 883 (1st Cir. 1971). Note, Due Process, Judicial Economy and the Hung Jury: A Reexamination of the Allen Charge, 53 Va. L. Rev., at 130.[7] In the instant case the judge made no reference to jurors who might hold a minority view. Also absent from the charge was an instruction, often regarded as coercive in a Tuey-type charge, on the undesirability of a mistrial. See *Rodriquez*, 364 Mass. at 100 n. 16; *Highland Foundry Co.* v. *New York N.H. & H.R.R.*, 199 Mass. 403, 406-409 (1908); *Commonwealth* v. *Brown*, 367 Mass. 24, 29-32 (1975).

However, the judge did instruct the jury that reaching a verdict one way or the other was "important"; and he predicted in substance that if the jurors entered upon their deliberations in an attitude of mutual consideration they would reach a verdict in "a short time." But we think that his remarks fell short of the frequently criticised statement in the Tuey charge that "the case must at some time be decided." *Tuey*, 8 Cush. at 2. *Rodriquez*, 364 Mass. at 98-99. Moreover, the judge expressly acknowledged the possibility of a hung jury when he stated, "[a] criminal jury may not disband from its deliberations until it either reaches a verdict *or is satisfied that it cannot reach a verdict*" (emphasis supplied). Compare *Highland Foundry Co.*, *supra* at 406-407; *United States* v. *Harris*, 391 F. 2d 348, 355 (6th Cir.), cert. denied, 393 U.S. 874 (1968).

[7]In response to this criticism, *Rodriquez*, 364 Mass. at 101, modified the Tuey charge to eliminate an express direction that the minority jurors reconsider their position.

A further factor distinguishing the charge before us from a traditional Tuey charge is that the alleged coercive aspects of the present charge were included in the original instructions to the jury. In *Tuey* and in most subsequent cases employing the Tuey charge, the instructions were delivered to a deadlocked jury. See *Tuey*, 8 Cush. at 1-2 and *Rodriquez*, 364 Mass. at 98. Inclusion of Tuey-type language in an original charge has not been fully considered in this Commonwealth. See *Commonwealth* v. *French*, 357 Mass. 356, 405 (1970), judgments vacated as to death penalty sub nom. *Limone* v. *Massachusetts*, 408 U.S. 936 (1972). The majority view is that Tuey-type language is far less coercive when included in the original instructions as opposed to supplemental instructions given to a deadlocked jury. *Nick* v. *United States*, 122 F. 2d 660, 674 (8th Cir. 1941). *United States* v. *Fioravanti*, 412 F. 2d at 419. *United States* v. *Marcey*, 440 F. 2d 281, 286 n. 27 (D.C. Cir. 1971). Note, The Allen Charge: Recurring Problems and Recent Developments, 47 N.Y.U.L. Rev. 296, 305 (1972). Some authorities have encouraged inclusion of such a charge in the original instructions. See *Burrup* v. *United States*, 371 F. 2d 556, 558 (10th Cir.), cert. denied, 386 U.S. 1034 (1967);[8] *United States* v. *Wynn*, 415 F. 2d 135, 137 (10th Cir. 1969), cert. denied, 397 U.S. 994 (1970). Compare *United States* v. *Thomas*, 449 F. 2d at 1182-1184.

The judge informed the jury that if they should have difficulty in reaching a verdict during the afternoon (Friday), "we may have to delay sometime in the evening until the following morning. Accommodations in such a case are provided, arrangements are made to secure the necessary over-

[8]The Supreme Judicial Court has approved a charge suggested by the American Bar Association which resembles the Tuey charge and is apparently intended for use in the original instruction or in a supplemental charge to a deadlocked jury. *Commonwealth* v. *Rodriquez*, 364 Mass. at 100-103 and Appendix B.

night accommodations, wear and articles. So don't be too alarmed about that." Contrary to the defendants' claim that these remarks amounted to a thinly veiled threat to keep the jurors overnight unless they should return a verdict, we think that they were intended to do no more than reassure the jury should their deliberations be extended.[9] See *United States* v. *Strauss*, 443 F. 2d 986, 991 (1st Cir.), cert. denied, 404 U.S. 851 (1971). Contrast *Pfeiffer* v. *State*, 35 Ariz. 321, 332 (1929); *Allen* v. *State*, 172 Miss. 472, 490-491 (1935).

Similarly, the judge's passing reference to the fact that it was "past noon on Friday," read in context, was not coercive. It seems to us that he was simply articulating a fact which was unquestionably present in the jurors' minds. The judge's reference to Friday afternoon carried with it no implicit suggestion "that it was more important to be quick than to be thoughtful." Compare *United States* v. *Flannery*, 451 F. 2d at 883.

The defendants challenge the judge's reference to the possibility of an appeal. In response to the defendants' request, the judge enlarged upon his instructions defining obscenity. The judge explained to the jury, as a preface to the additional instruction, that "in order to make a clear record in case this matter goes up on appeal, I wouldn't want the appellate judges to think that you were unacquainted with certain of these matters."[10] There is no absolute ban against reference at trial to the appellate process. *Commonwealth* v. *Walker*, 370 Mass. at - [Mass. Adv. Sh. (1976) at 1693-1695]. In *Walker* the court upheld the conviction where the trial judge had described the appellate process to the jury

[9]One juror had in fact expressed reservations about being "locked up."

[10]The judge had instructed the jurors individually in the course of the jury selection procedure, and collectively as part of his original charge, on the definition of obscenity.

in some detail including the fact, not mentioned in the instant charge, that only the defendant had the right of appeal. We think that there was no danger here that the judge's reference to an appeal would have "the inescapable effect of reducing the jurors' appreciation of the significance of their deliberations and verdict" or of implicitly telling them "not to be overly concerned about rendering hasty or 'correct' verdicts." *Id.* at [Mass. Adv. Sh. (1976) at 1693-1695].

We conclude that although the judge's references to Friday afternoon and to the possibility of an appeal would have been better left unsaid, his instructions viewed as a whole (*Commonwealth* v. *Pinnick*, 354 Mass. 13, 15 [1968]; Smith, Criminal Practice and Procedure § 1080, at 472 [1970]) were not coercive.

The defendants' several objections to the judge's instructions to the jury in defining the knowledge which must be shown for a conviction under § 29 strike us as being largely superficial. The judge drew accurately both upon the statutory definitions in § 31 and upon the Supreme Judicial Court's interpretation of §§ 29 and 31. *Commonwealth* v. *707 Main Corp.*, Mass. at - [Mass. Adv. Sh. (1976) at 2652-2653]. *Commonwealth* v. *Thureson*, Mass. , (1976) [Mass. Adv. Sh. (1976) 2659, 2662]. Whether a judge reads or states the substance of a statute to a jury is left to his discretion. *Commonwealth* v. *Greenberg*, 339 Mass. 557, 585 (1959). Smith, *supra*, § 1079, at 471.

The defendants' objections to the charge on the subject matter of obscenity were inconsequential; for example, their objection to the judge's statement that prurient interest includes an appeal to "lustful instincts," and their objection that the judge instructed the jury to use an average citizen's standard to

determine "whether or not what was shown would be patently offensive, both what was shown and the fact that it was shown on a film."

We find no merit in the defendants' objection to the judge's use of an analogy involving driving under the influence of alcohol for the purpose of illustrating that in certain areas of behavior there are community standards; and the fact that individuals on occasion fall below those standards does not indicate that the standards are nonexistent. In our view the variations from the approved definition of obscenity included in the charge were insignificant. See *Miller* v. *California*, 413 U.S. 15 (1973); *Commonwealth* v. *707 Main Corp.*, Mass. at [Mass. Adv. Sh. (1976) at 2643]. Read as a whole, the charge accurately instructed the jury. *Commonwealth* v. *Pinnick*, 354 Mass. at 15. *Commonwealth* v. *Godin*, Mass. , (1977) [Mass. Adv. Sh. (1977) 2790, 2802].

The defendants claim error in the judge's refusal to give numerous requested instructions. We have examined each of the requests and have concluded that those which accurately state the law were given in substance and that there was no error. *Commonwealth* v. *Godin*, *supra*, and cases cited.

The defendants also claim error in the admission and exclusion of certain evidence and in the denial of their motion for a view of the adult entertainment district. In passing on these questions the judge was obliged to determine whether the probative value of the evidence would outweigh its prejudicial effect or a tendency to confuse the jury (*Commonwealth* v. *Cohan*, 307 Mass. 179, 183 [1940]; Leach & Liacos, Massachusetts Evidence at 295-296 [4th ed. 1967]; Hughes, Evidence § 284, at 340-341 [1961]); and his rulings are to be overturned only upon a showing of an abuse of discretion. *Commonwealth* v. *D'Ambra*, 357 Mass. 260, 263-264 (1970). *Commonwealth* v. *Bys*, 370 Mass. , (1976) [Mass. Adv. Sh. (1976) 1358, 1374].

There was no abuse of discretion in the admission of certain checks, check stubs, lease documents and business records of the corporation. They were probative to show Mascolo's control of the corporation's activities and of the premises where the film was exhibited and were, therefore, probative of the issue of the defendants' knowledge of the contents of the film. It was for the judge to determine whether their probative value to show knowledge would outweigh any possible prejudice to the defendants as an indication that they were part of an interstate trade in pornography. Leach & Liacos, *supra*, at 295. Even if some of that evidence had been cumulative, it would have been admissible in the discretion of the judge. *Nelson* v. *Hamlin*, 258 Mass. 331, 341 (1927). There was likewise no abuse of discretion in the exclusion of evidence offered by the defendants with respect to the numbers of patrons of the theatre, the corporation's cash deposits, and zoning regulations which located the theatre in or near the adult entertainment district or in the judge's denial of the defendants' motion for a view of the district. The admission of that evidence could have improperly focused the jury's attention upon a limited geographical area and upon a limited segment of the population. The judge in the exercise of sound discretion could have determined that this evidence would have served only to confuse the jury and would not have assisted them in reaching an understanding of the standards held by the average citizen of the Commonwealth as required by G. L. c. 272, § 29. For the same reasons, there was no abuse of discretion in the denial of the motion for a view. *Commonwealth* v. *McGaffigan*, 352 Mass. 332, 336 (1967). *Commonwealth* v. *Crespo*, 3 Mass. App. Ct. , (1975) [Mass. App. Ct. Adv. Sh. (1975) 1174, 1179]. Leach & Liacos, *supra* at 285, 286.

The judge was right in his denial of the defendants' motions to dismiss and for a new trial. The motions were based upon allegations of prejudicial pretrial publicity and bias of one

juror. The basis of the motion to dismiss was the defendants' claim that a police official had made a statement to the press after trial had commenced suggesting a connection between the defendants and organized crime. There was no affirmative response to the judge's inquiry of the jurors whether any of them had heard or read any reference to the allegedly prejudicial statement. The extent of the questioning of jurors in exploring the possible effect of prejudicial publicity rests in the discretion of the trial judge. *Commonwealth* v. *Subilosky*, 352 Mass. 153, 158 (1967). We decline to accept the defendants' suggestion, unsupported by authority, that we should adopt a per se rule requiring dismissal of a criminal complaint whenever a police official makes a potentially prejudicial statement to the press during a trial. Contrast *Commonwealth* v. *Manning*, Mass. , - (1977) [Mass. Adv. Sh. (1977) 2060, 2067-2068].

In support of their motion for a new trial the defendants assert that it was discovered after trial that one juror might have known either or both the prosecutor and defense counsel. The motion, filed nearly two months after the trial had been concluded, was supported by an affidavit of defense counsel. The motion was addressed to the sound discretion of the judge. *Commonwealth* v. *Delle Chiaie*, 323 Mass. 615, 618-619 (1949). *Commonwealth* v. *Grace*, 370 Mass. , (1976) [Mass. Adv. Sh. (1976) 1984, 1991]. The weight and import of the supporting affidavit were for the judge to assess. *Id.* at

[Mass. Adv. Sh. (1976) at 1992]. The incident, a public hearing, which had allegedly demonstrated the juror's knowledge or familiarity with counsel had occurred three years prior to trial. There was no evidence that the hearing had been attended or watched by her on television. The only allegations of fact bearing on that hearing concerned not the juror herself but her husband. The judge had asked the jurors whether they were familiar or were "acquainted" with the attorneys and whether they might harbor any prejudice which would prevent them from reaching an impartial verdict. The responses to these questions given by the juror whose indifference was questioned, combined with the tenuous connection between her and the attorneys, could reasonably have led the judge to conclude that she stood indifferent. There was no error in the judge's refusal to hold an evidentiary hearing on the motion. *Commonwealth* v. *Coggins*, 324 Mass. 552, 557, cert. denied, 338 U.S. 881 (1949). *Commonwealth* v. *Cresta*, Mass. App. Ct. (1978) [Mass. App. Ct. Adv. Sh. (1978) 184].

Finally, the defendants assert that where a judge of the Municipal Court of the City of Boston had imposed fines of $2,500 upon Mascolo and $2,500 upon the corporation, the Superior Court judge erred in sentencing Mascolo to serve one year in a house of correction and fining the corporation $5,000. They claim that imposition of the heavier sentences in the Superior Court impermissibly penalized them for exercising their right to a trial by jury and chilled the exercise of their First Amendment rights. They rely upon *Callan* v. *Wilson*, 127 U.S. 540, 557 (1888), and *Kansas City* v. *Darby*, 544 S.W. 2d 529 (Mo. 1976). The defendants' claim is defeated by *Ludwig* v. *Massachusetts*, 427 U.S. 618 (1976). In *Ludwig* the Court analyzed and upheld the Massachusetts two-tier system under which a defendant charged with certain crimes is first tried in a District Court without a right to a jury. *Id.* at 620. See G. L. c. 218, § 26; Case Comment, Constitutional Law — *Mann* v. *Commonwealth*, 6 Suffolk U.L. Rev. 1087, 1091 (1972). The Court noted that after conviction in a District Court a defendant has the right to appeal to the Superior Court for a trial de novo to a jury. In that event the District Court conviction is vacated. *Ludwig*, 427 U.S. at 621-622. The Court observed that the defendant could in effect avoid trial at the District Court level by "admitting sufficient find-

ings of fact" and the Court concluded that "the mere possibility of a harsher sentence does not unconstitutionally burden an accused's right to a trial by jury." *Ludwig*, *supra*, at 626, 627. *Mann* v. *Commonwealth*, 359 Mass. 661, 663 (1971).

The defendants claim that the reasoning of *Ludwig* should not be controlling in the present case which involves obscenity. They argue that because the jury have the unique role in an obscenity case of determining the applicable standard, as well as applying it to the facts, the possibility of a heavier sentence for exercising the right to a jury trial is impermissible. We disagree with the contention that a defendant, charged with obscenity, is impermissibly burdened by the two-tier system. Such a defendant can in effect avoid any trial in a District Court by admitting sufficient facts and proceeding to a jury trial in the Superior Court. The ensuing trial in that court is divorced from the District Court proceeding; and both parties start with a clean slate as to guilt and disposition.[11] *Mann* v. *Commonwealth*, *supra*, at 664, 666.

The defendants have not claimed that any restriction was imposed upon their activity between the time of the District Court conviction and the jury trial in the Superior Court; nor have they argued that the trial in the Superior Court was delayed by the District Court proceeding. See *Ludwig*, 427 U.S. at 629.

Judgments affirmed.

[11] The defendants have not claimed that the harsher sentence imposed by the Superior Court was punishment for exercising the right to a retrial in Superior Court. See *North Carolina* v. *Pearce*, 395 U.S. 711, 723-726 (1969).

Appendix B.

COMMONWEALTH OF MASSACHUSETTS.

APPEALS COURT FOR THE COMMONWEALTH,

AT BOSTON, April 25, 1978.

IN THE CASE OF COMMONWEALTH *vs.* ANTHONY C. MASCOLO AND UNITED AMERICAN THEATRE CORPORATION D/B/A PUSSYCAT CINEMA pending in the Superior Court for the County of Suffolk

ORDERED, that the following entry be made in the docket; viz., —

Judgments affirmed.

BY THE COURT,

JOHN E. POWERS, CLERK.

April 25, 1978.

Supreme Court, U. S.
FILED
AUG 23 1978
MICHAEL RODAK, JR., CLERK

In the
Supreme Court of the United States.

OCTOBER TERM, 1978.

No. 78-131.

ANTHONY C. MASCOLO AND
UNITED AMERICA THEATRE CORPORATION
D/B/A PUSSYCAT CINEMA,
PETITIONERS,

v.

COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPEALS COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

Brief of the Respondent in Opposition.

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BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS.

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In the
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OCTOBER TERM, 1978.

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ANTHONY C. MASCOLO AND
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PETITIONERS,

v.

COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPEALS COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

Brief of the Respondent in Opposition.

Respondent is not dissatisfied with petitioners' citation of the opinion below, their statement of jurisdiction or their statement of the case.

Questions Presented.

1. Whether review by this Court of the claimed error in the trial court's instruction on scienter is appropriate where there is no conflict between the decisions of this Court and of the Massachusetts Supreme Judicial Court on the requirement of scienter in an obscenity case.

2. Whether, since the trial *de novo* system has been abolished in Massachusetts, the individual petitioner's claim that the exercise of his First Amendment rights was chilled by the *de novo* system raises a substantial federal question.

3. Whether the trial court's refusal to convene a state-wide venire was a proper exercise of its discretion.

Argument.

I. Review by this Court of the Claimed Error in the Trial Court's Instruction on Scienter is Inappropriate Since there is No Conflict Between the Decisions of this Court and of the Massachusetts Supreme Judicial Court on the Requirement of Scienter in an Obscenity Case.

The petitioners assert that the trial court improperly instructed the jury that it could bring in a guilty verdict in this obscenity case if it found that the petitioners either knew of the contents of the film or were aware of the nature and character of the material (petitioners' brief, p. 8). While the trial court did conclude its remarks with this comment, a review of the entire charge reveals that the jury was adequately instructed. See *Hamling* v. *United States*, 418 U.S. 87, 107-108 (1974). (See also Appendix A, *infra*.)

Indeed, in affirming the petitioners' convictions the Massachusetts Appeals Court held that the charge taken in its entirety was adequate.

> The defendants' several objections to the judge's instructions to the jury in defining the knowledge which must be shown for a conviction . . . strike us as being largely superficial. *Commonwealth* v. *Mascolo*, ____ Mass. App. Ct. ____, Mass. App. Ct. Adv. Sh. (1978) 435, 448.

Thus, the trial court's isolated misstatement does not constitute error which presents a substantial federal question. See *Cupp* v. *Naughten*, 414 U.S. 141, 147 (1973).

Assuming, as the petitioners assert, that the Massachusetts Appeals Court improperly affirmed the trial court's instructions, any error in the Appeals Court's decision is indeed an isolated one and does not represent a departure from Massachusetts law. Prior to the Appeals Court's decision in this case, the Massachusetts Supreme Judicial Court ruled that a defendant must be shown to have knowledge of the contents of the allegedly obscene material as well as knowledge of its general character in order to be found guilty. *Commonwealth* v. *707 Main Corp.*, ____ Mass. ____, Mass. Adv. Sh. (1976) 2643, 2653:

> [The Massachusetts obscenity statute] does not dispense, however, with the constitutional requirement that a defendant have knowledge of the matter's contents and general character before a criminal conviction for its dissemination may be obtained.

This Court has similarly held that the federal Constitution minimally requires a demonstration of knowledge of the contents as well as of the character of the allegedly obscene material. *Hamling* v. *United States*, *supra*, 418 U.S. at 123.

Thus, even assuming error in the Appeals Court's decision, review by this Court is inappropriate. The decisions of the Supreme Judicial Court on this issue are not in conflict with this Court's rulings. To grant a petition for certiorari in this case would, therefore, be a meaningless exercise, for this Court's ultimate decision would have application only to these facts.[1]

II. SINCE THE TRIAL DE NOVO SYSTEM HAS BEEN ABOLISHED IN MASSACHUSETTS, THE INDIVIDUAL PETITIONER'S CLAIM THAT HIS EXERCISE OF HIS FIRST AMENDMENT RIGHTS WAS CHILLED BY THE DE NOVO SYSTEM FAILS TO RAISE A SUBSTANTIAL FEDERAL QUESTION.

In yet another assault on the trial *de novo* system, the individual petitioner asserts constitutional error in the imposition of a jail sentence after his *de novo* appeal where he had only been fined by the District Court. Conceding that this Court's decision in *Colten* v. *Kentucky*, 407 U.S. 104, 116 (1972), bars a claim that *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), applies to his case, he asserts that the First Amendment is offended by the imposition of a one-year sentence after his jury trial in the Superior Court (petitioners' brief, pp. 9-

[1]The petitioners also complain of the trial court's use of an analogy to demonstrate community standards. While the analogy might have been inappropriate, or even misleading, it cannot be said that it so infected the entire trial, for the trial court adequately instructed the jury on its responsibility to determine community standards. See *Cupp* v. *Naughten*, *supra*, 414 U.S. at 147. (See also Appendix B, *infra*.)

11). Notwithstanding the merits, or lack thereof, of the petitioner's argument, the recent abolition of the *de novo* system by the Massachusetts Legislature substantially eliminates any reason for this Court's granting review in this case, for there is little, if any, possibility that this issue will arise in the future.

Pursuant to § 158 of c. 478 of the Acts of 1978 (adding § 268A to M.G.L. c. 218), trial of all criminal offenses within the jurisdiction of the District Courts of the Commonwealth "shall be by a jury of six, unless the defendant files a written waiver and consent to be tried by the court without a jury." Thus, all defendants now have a right to a jury trial in the first instance which they must affirmatively waive if they desire a bench trial. While there is no constitutional right to a jury trial in an obscenity case, a defendant who fears a bench trial, for whatever reason, can have his jury trial initially in the District Court.[2]

The situation complained of by the petitioner would, therefore, only arise again if a jury trial were not initially available. Since it now is, future defendants in obscenity prosecutions could not complain that a bench trial in the first instance chilled the exercise of their First Amendment rights, for it would be they who affirmatively avoided the initial jury trial. Thus, the petitioner's claim poses no substantial question appropriate for review by this Court.

III. THE TRIAL COURT'S REFUSAL TO CONVENE A STATE-WIDE VENIRE WAS A PROPER EXERCISE OF ITS DISCRETION.

The petitioners finally claim that the trial court was constitutionally obligated to convene a venire from the entire

[2]The Sixth Amendment right to a jury trial is conditioned upon the seriousness of the offense, not the nature of the offense. *Baldwin* v. *New York*, 399 U.S. 66, 73 (1970). Thus, if the maximum potential sentence for violation of this Massachusetts obscenity statute were less than six months the constitutional right to a jury trial would not obtain. *Id.*

Commonwealth since a county venire is, per se, unable to apply relevant community standards in determining whether the petitioners' film was obscene (petitioners' brief, pp. 12-13). This claim also is not worthy of review by this Court.

While the Supreme Judicial Court has held in *Commonwealth* v. *Trainor*, ____ Mass. ____, Mass. Adv. Sh. (1978) 899, 901, that the trier of fact ". . . must use an average citizen of Massachusetts as the standard for determining whether particular matter appeals to the prurient interest of the average person and for determining whether the matter depicts or describes sexual conduct in a patently offensive way," the petitioners point to no evidence which even suggests that a jury drawn from Suffolk County is incapable of applying such a standard. In affirming the petitioners' convictions, the Appeals Court found this lack of evidentiary support fatal to their claim.

> . . . there is no showing on the record before us that a jury drawn from a statewide venire would be more likely to perceive and to apply the contemporary standards of the Commonwealth as measured by the views of an average citizen than would a jury drawn from a single county. *Commonwealth* v. *Mascolo*, *supra*, Mass. Adv. Sh. (1978) at 439-440.

Thus the petitioners' failure to demonstrate any prejudice voids their claim. Cf. *Peters* v. *Kiff*, 407 U.S. 493, 504 (1972).

The petitioners speculate, nevertheless, that a juror drawn from the Boston area, concededly the largest metropolitan center in Massachusetts, is not representative of community views toward obscenity (petitioners' brief, p. 13). The Constitution, however, mandates that a jury be drawn from a fair

cross-section of the community, not an actual one. See *Smith* v. *Texas*, 311 U.S. 128, 130 (1940). Moreover, it is as easily arguable that a metropolitan venire, more exposed to diverse views and mores, would more readily find a matter not to be obscene. This Court, however, should not predicate its decisions upon such conjecture.

Conclusion.

For the above-stated reasons the petition for a writ of certiorari to the Appeals Court of the Commonwealth of Massachusetts should be denied.

Respectfully submitted,

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Appendix A.

Excerpt from Charge to Jury.

Now this a jury is not only permitted to do, that is, draw inferences, but humanity and human affairs being what they are, it is required to draw inferences. For example, as I look out the window — I don't know if you can see out a window — I see a blue sky and I see brightly lighted texture of the building outside, from which I infer that the sun is shining. I cannot see the sun, and yet I infer from what I have just described, those facts, that the sun indeed is shining and I am satisfied of that beyond a reasonable doubt.

And in cases of this kind you are not faced with facts as pleasant as the fact that the sun is shining; but from your experience, given certain facts, from your experience and your mental processes it reasonably follows from a fact that you have observed and that you are satisfied exists or is true beyond a reasonable doubt, you may draw therefrom reasonable inferences leading you to conclude that if these certain facts that you have satisfied yourself are so beyond a reasonable doubt, then it reasonably follows that the next fact exists or did exist and was a fact. This you are not only entitled to do, but in order to make sense out of our affairs, this you must do. All right.

Now I must turn again to what must be becoming your favorite statute and mine and I am going to turn to some parts of it that you and I have not previously discussed. The section that you and I dealt with the other day was the one that involved definitions, and I only dealt with you with one definition. The section under which the defendants are charged is section 29 of the same statute, and this is not too difficult, as I read it, but I will probably make some other remarks. Whoever disseminates — shows or exhibits — any matter which is

obscene, knowing it to be obscene, or whoever has in his possession any matter which is obscene, knowing it to be obscene, with the intent to disseminate shall be punished.

Now like all statutes, that raises as many problems in its rather simple wording as it solves. Notice those phrases, knowing it to be obscene. What does this mean? Well, fortunately for you and me, our Supreme Judicial Court has dealt with this question — or, rather, the statute itself has dealt with the question, because in the section, parts of which you and I have been over before, that contains definitions they define knowing for the purposes of this statute. Knowing means a general awareness of the character of the matter. A general awareness.

In short, though that section 29 says knowing it to be obscene, the court says that the defendant doesn't need to know that the matter is obscene as a matter of law but, rather, must know the general character of the film. That's what knowing it to be obscene means.

Now I see some expressions of doubt, and let me see if I can clarify that. A general awareness of the character of the matter is sufficient for a person to be found to have knowledge that the matter was obscene under this statute. Furthermore, our court has said the prosecution need not show that a defendant knew the matter to be legally obscene in order to sustain the prosecution's burden of proof. Furthermore, the prosecution need not prove by direct evidence that the defendant had knowledge of all of the material's contents. The prosecution must produce evidence, however, from which a jury could conclude beyond a reasonable doubt that the defendant had seen or should have seen or otherwise had knowledge of the material's contents or, as the statute said, a general awareness of the character of the contents of the film.

Now here is probably a good enough time for me to deal with first the corporation and then Mr. Mascolo. You must decide — and this is why I talked to you about inferences — you must decide whether or not the film was ordered without any knowledge of its general character, whether or not the film was advertised without a knowledge of its general character, whether or not it was in fact shown from the projection room without a general knowledge or without knowledge of its general character. If you find that this enterprise, United American Theatre, was a commercial undertaking, then you must consider the problem of whether or not such an undertaking, whatever it was, would purchase, advertise and show a film without having a knowledge of its general character.

In short, here, as in so many cases, you cannot, not being mindreaders, explore the interior of a person's brain, but you are able, whichever way you go, to conclude from the activities, if you find that such existed or were performed, whether or not as the statute says, there was a general awareness of the character of the film on the part of Mr. Mascolo.

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Appendix B.

Excerpt from Charge to Jury.

Prurient interest we have been over several times. I gave you a quote from an opinion when I was talking to you on the stand that the film had to taken as a whole — dominant theme went substantially beyond customary limits of frankness in appealing to a shameful or morbid interest in sex. The dictionary definition has language that also indicates that it must appeal to lustful instincts as it is being shown and, of course, that would follow that you would imagine that the word prurient included — and it does — an appeal to lustful instincts but that its dominant theme must be one which goes substantially beyond customary limits of frankness in appealing to a shameful or morbid interest in sex. This you remember from our interviews.

You will also recall that since that part of the statute referred to the prurient interest of the average person, that that is the standard you must use, not your own, you may remember, but rather the average person's views as you understand them to be in your own community. That's what the statute and the court in its definition says.

Sexual conduct in a patently offensive way. Again, you must use the average citizen. Whether or not what was shown would be patently offensive, both what was shown and the fact that it was shown on film, must be patently offensive to the average person applying standards of the Commonwealth.

And, finally, the film lacked serious literary, artistic, political or scientific value.

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